COLLATERAL ATTACK BY HABEAS CORPUS IN UNCONSTITUTIONAL CONVICTIONS

State ex rel. Treat v. Alvis, Warden
(Crim. No. 203,126, C.P., Franklin County, Ohio, Jan. 12, 1959)

The plaintiff petitioned for a writ of habeas corpus in the Common Pleas Court of Franklin County, Ohio, on January 12, 1959. He had been indicted in two cases on June 23, 1950, both under section 2903.01 of the Ohio Revised Code entitled "Assault upon a child under sixteen years."[1] On arraignment, he pleaded "not guilty" to each charge. Upon trial of one of these cases on November 10, 1950, he was found "guilty" and eventually sentenced to the Ohio Penitentiary. In December of 1957, he was "parolled"; however, this was of little significance since on June 29, 1954, more than four years after the indictment, he had been tried on the second charge and again found "guilty," sentence to "begin after the expiration of his current confinement."[2] Thus, he immediately began serving the sentence in the second case upon his "parol" in the first case.

The due process clause of the fourteenth amendment of the United States Constitution[3] and article one, section ten of the Ohio Constitution[4] have long guaranteed a speedy trial to those accused of a crime. To quote the opinion rendered in the noted case, ". . . the petitioner in this case was not afforded a speedy trial . . . [since] he was indicted June 23, 1950, . . . [and] tried on June 29, 1954,—*more than four years later.*"[5] Yet the court was bound by precedent to deny the writ of habeas corpus since in Ohio, where an appeal or direct attack is or ever has been available, one may not attack his conviction collaterally in a habeas corpus proceeding.[6] As recently as May, 1960, the Ohio Supreme Court reaffirmed this doctrine in *State ex rel. Sheppard v. Alvis, Warden.*[7]

However, in *State ex rel. Bailey v. Henderson,*[8] a man was sentenced to 20 years imprisonment after pleading "guilty," on the advice of counsel, to a forgery indictment. His only crime was drawing a check with in-

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[1] Ohio Rev. Code § 2903.01.

[2] This statement appears on p. 3 of the opinion in the noted case.

[3] U.S. Const. amend. VI; "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ."

[4] Ohio Const. art. 1, § 10: ". . . In any trial, in any court, the party accused shall be allowed . . . a speedy public trial . . . ."

[5] This statement appears on p. 1 of the opinion in the noted case.

[6] *In re* Kramer, 163 Ohio St. 510, 127 N.E.2d 367 (1955) (denial of a constitutional right in the trial); *In re* Knight, 144 Ohio St. 257, 58 N.E.2d 671 (1944) (denial of jury trial); *In re* Whitmore, 137 Ohio St. 313, 29 N.E.2d 363 (1940) (trial court judge absent during part of the trial); *Ex parte* Joseph Van Hagan, 25 Ohio St. 426 (1874) (the law had been changed to set a maximum sentence of 30 days for the prisoner's crime); *Ex parte* McGehan, 22 Ohio St. 442 (1872) (failure to bring accused to trial within the time limited by the criminal code).

[7] State *ex rel.* Sheppard v. Alvis, Warden, 170 Ohio St. 551, 167 N.E.2d 94 (1960).

[8] State *ex rel.* Bailey v. Henderson, 76 Ohio App. 547, 63 N.E.2d 830 (1945).

sufficient funds, clearly not forgery. The time for appeal had long since passed as he assumed that his attorney had correctly advised him; yet, in the interest of preventing a gross miscarriage of justice, the Ohio Supreme Court allowed him to successfully maintain a writ of habeas corpus. Why the court has refused in recent years even to consider the *Henderson* case is not clear.

Only four other states take the same view as Ohio.[9] England[10] and most other states have clearly allowed one to use the writ of habeas corpus as the appropriate remedy in such cases. In those states allowing its use, some permit it only if brought in the trial court[11] while others do not make this restriction.[12]

It is well established that a writ of habeas corpus cannot be used as a substitute to review errors of law or irregularities in the conduct of the trial; this is the function of a direct appeal—not of a collateral attack by habeas corpus proceedings. It appears, however, that the Ohio Supreme Court has extended this principle to exclude the use of habeas corpus even to protect one's constitutional rights. While there is a valid interest in limiting the number of appeals and attacks which can be made against a conviction and a concern in preventing overcrowding of our dockets, we also have a great interest in preserving the fundamental rights guaranteed in the federal and state constitutions. Moreover, we must be willing to go to great lengths to preserve such rights. When a situation arises where one is clearly denied such a right, it is very questionable that his mere failure to use a direct attack by appeal within the time limited for such action should prevent his use of habeas corpus when clear unconscionable situations would otherwise result.

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[9] People v. Strassheim, 228 Ill. 581, 81 N.E. 1129 (1907); People v. Murphy, 212 Ill. 584, 72 N.E. 902 (1904); McGuire v. Wallace, 109 Ind. 284, 10 N.E. 111 (1886); *In re* Spradlend, 38 Mo. 547 (1866); *Ex parte* Simonton, 9 Port. 390, 39 Am. Dec. 320 (1840).

[10] Regina v. Bowen, 9 Car. & P. 509, 173 Eng. Rep. 933 (1840).

[11] Cummins v. The People, 4 Colo. App. 71, 34 Pac. 734 (1893); Griswold v. State, 77 Fla. 505, 82 So. 44 (1919); Commonwealth v. Phillips, 16 Mass. 423 (1820); Commonwealth v. Lorin Carter, 28 Mass (11 Pick.) 277 (1831); Nixon v. State, 2 Smedes & M. 497 (1844); State *ex rel.* Northrup v. Conrow, 13 Mont. 552, 35 Pac. 240 (1893); United States v. Fox, 3 Mont. 512 (1880); Commonwealth *ex rel.* McGurk v. Superintendent, 97 Pa. 211 (1881); Clark v. Commonwealth, 29 Pa. 129 (1858); State v. Williams, 35 S.C.L. 160, 14 S.E. 309 (1892); State v. Spergen, 12 S.C.L. 563 (1822); State v. Stalnaker, 4 S.C.L. 44 (1806); Dulin v. Lillard, Sheriff, 91 Va. 718, 10 S.E. 821 (1895); State v. Brodie, 7 Wash. 442, 35 Pac. 137 (1893); *Ex parte* Blankenship, 93 W. Va. 408, 116 S.E. 751 (1923); *Ex parte* Bracey, 82 W. Va. 69, 95 S.E. 593 (1918).

[12] *In re* Ford, 160 Cal. 334, 116 Pac. 757 (1911); *Ex parte* Vinton, 5 Cal. Unrep. 624, 47 Pac. 1019 (1896); *In re* Miller, 66 Colo. 261, 180 Pac. 749 (1919); Crister v. State, 87 Neb. 727, 127 N.W. 1073 (1910); *Ex parte* Larkin, 11 Nev. 90 (1876); *Ex parte* Stanley, 4 Nev. 113, (1868); State v. Dilts, 76 N.J.L. 410, 69 Atl. 255 (Sup. Ct. 1908); *In re* Blair, 32 Misc. 175, 65 N.Y. Supp. 640 (Sup. Ct. 1900); State *ex rel.* Adams v. Larson, 12 N.D. 474, 97 N.W. 537 (1903); People v. Jefferds, 5 Park Crim. Rep. 518 (N.Y. 1861); People v. Rulloff, 5 Park Crim. Rep. 77 (N.Y. 1860); *In re* Desolvers, 35 R.I. 148, 86 Atl. 657 (1913); Rutherford v. State, 16 Tex. App. 649 (1884); *Ex parte* Cox, 12 Tex. App. 665 (1882); Harrall v. State, 4 Tex. Ct. App. R. 427 (1878).

Exactly such a situation is present in the instant case. The petitioner was clearly denied his constitutional right to a speedy trial. He did not appeal his second conviction directly because at that time, he was in prison serving the sentence from his first conviction. It was not until he was "parolled" some two years later on the first conviction that he realized that he had failed to appeal in time. It seems very unlikely that he was aware of this requirement. Dut to the refusal of the Ohio Supreme Court to permit habeas corpus to be employed in such a situation, the petitioner's constitutional right to a speedy trial was clearly lost.

The United States Supreme Court appears to have recognized the need to permit the use of habeas corpus in such situations. In *Johnson v. Zerbst, Warden,*[13] the court said, "True, habeas corpus cannot be used as a means of reviewing errors of law and irregularities . . . occurring during the course of the trial, and the writ of habeas corpus cannot be used as a writ of error. These principles, however, must be construed and applied so as to *preserve —not destroy*—constitutional safeguards of human life and liberty."[14]

Although habeas corpus must be limited to prevent its use as a mere substitute for a direct attack on a final determination of one's guilt, it is often the ideal remedy—sometimes the only remedy—for one who has been convicted while having been denied a basic constitutional right.[15] The principle that habeas corpus is not a remedy for the review of mere errors or irregularities at the trial should not be tantamount to constitutional safeguards of life and liberty. For this reason, it may well be time for the Ohio Supreme Court to review its position on this question as was urged by the common pleas judge in the instant case.

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[13] Johnson v. Zerbst, Warden, 304 U.S. 458 (1838).

[14] *Id.*, at 465 (emphasis added).

[15] This statement appears on p. 5 of the opinion in the noted case.